82-1989

No.

In the Supreme Court of the United States

October Term, 1982

THE HONORABLE BENNETT H. BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,

Petitioners,

vs.

STATE OF FLORIDA, ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY d b a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, and ARMANDO MERINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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June 1, 1983

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Florida Supreme Court to prohibit Florida public defenders from filing any class action suits on behalf of their clients violates the rights to independent counsel and access to courts guaranteed indigents by the Sixth and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the Supreme Court of Florida:

Relators

The State of Florida

Jim Smith, Attorney General of the State of Florida

Public Health Trust of Dade County [Florida] doing business as Jackson Memorial Hospital

Thomas J. Kelly
Josephina Perez
James Sussex
Armando Merino,

Employees of Public Health Trust of Dade County d/b/a Jackson Memorial Hospital

Respondents

The Honorable Bennett H. Brummer,

Public Defender of the Eleventh Judicial Circuit Court of Florida (Dade County)

Barry Weinstein,
William Ploss,

Assistant Public Defenders of the Eleventh Judicial Circuit Court of Florida

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OPINION IN THE COURT BELOW

The opinion of the Supreme Court of Florida appears at 426 So.2d 532 (Fla. December 16, 1982; rehearing denied, March 3, 1983) and is reproduced at A. 1-4.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on December 16, 1982. A Motion for Rehearing or Clarification of Decision was timely filed 15 days later on January 3, 1983 pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure (A. 118-123), which motion was denied by the Supreme Court of Florida on March 3, 1983. (A. 1, 5). This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws."

Title 42, § 1983 of the United States Code provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privi-

leges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 23 of the Federal Rules of Civil Procedure provides, in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards or conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive re-

lief or corresponding declaratory relief with respect to the class as a whole. . . ."

Article V, § 3(b)(8) of the Florida Constitution provides:

"The Supreme Court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."

Fla. Stat. § 27.51 provides, in part:

"(1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent . . . and who is:

(a) Under arrest for, or is charged with, a felony;

(b) Under arrest for, or is charged with, a misdemeanor, a violation of chapter 316 which is punishable by imprisonment, or a violation of a municipal or county ordinance in the county court, unless the court, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if he is convicted;

(c) Alleged to be a delinquent child pursuant to a petition filed before a circuit court; or

(d) Sought by petition filed in such court to be involuntarily hospitalized as a mentally ill or mentally retarded person.

* * *

(3) Each public defender shall serve on a full-time basis and is prohibited from engaging in the private practice of law while holding office. . . .

DR 5-107(B), CODE OF PROFESSIONAL RESPONSIBILITY, provides:

"A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

STATEMENT OF THE CASE

In this case, the Attorney General of the State of Florida responded to the filing of a federal class action suit by the Public Defender for the Eleventh Judicial Circuit of Florida (the "Public Defender")[1] by seeking and obtaining from the Florida Supreme Court the issuance of a writ of *quo warranto* imposing a *per se* ban on the filing of class actions on behalf of indigents in any court by Florida public defenders. This action to review that decision is brought in this Court as a petition for writ of certiorari to the Florida Supreme Court, rather than as an appeal, because the Petitioners have contended throughout the course of this litigation that no Florida statute prohibits their filing appropriate class action suits on behalf of named plaintiffs they have been appointed to represent and all similarly situated persons. Because the Florida Supreme Court's purported construction of wholly unspecified statutory provisions to prohibit such actions is itself erroneous, as well as unconstitutional, no Florida statute has been drawn into question and no appeal lies.

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1. Petitioner The Honorable Bennett H. Brummer is the Public Defender of the Eleventh Judicial Circuit of Florida, which is comprised exclusively of Dade County, Florida. Petitioners Barry Weinstein and William Ploss are Assistant Public Defenders of the Eleventh Judicial Circuit of Florida. All three are collectively referred to herein as the "Public Defender" or the "Public Defender's Office." Respondents are the State of Florida, Florida Attorney General Jim Smith (the "Attorney General"), the Public Health Trust of Dade County doing business as Jackson Memorial Hospital, and the following employees of the Public Health Trust of Dade County d/b/a Jackson Memorial Hospital: Thomas J. Kelly, Josephina Perez, James Sussex, and Armando Merino. Respondents are referred to herein either individually, or collectively as "the State" or "Respondents."

A. The Involuntary Commitment Proceeding

On September 17, 1980, "G.A.", a 17-year-old minor indigent was, at the request of his mother, voluntarily admitted for psychological and psychiatric treatment to the Adolescent Unit of Jackson Memorial Hospital (the "facility") which is operated by Respondent Public Health Trust of Dade County. (A. 18). While in the "care" of the facility, G.A. was subjected to a "treatment" program characterized by an independent psychiatrist as utilizing

> a form of adverse conditioning and punitive sanctions . . . [which lack] any discernable standards or reason . . . that would medically and psychiatrically justify their application to G.A.

(A. 46). Pursuant to this program, G.A. was (i) required to ingest powerful mind-altering drugs without his consent or that of his guardian in violation of Florida law, (ii) forced to sleep in the halls of the facility on only a mattress, (iii) denied any opportunity for exercise or access to sunlight and fresh air, (iv) placed in solitary confinement for prolonged periods of time, (v) absolutely prohibited from communicating with his friends or mother, (vi) confined for more than six days with no one other than a psychotic adult male who spoke only Spanish, and (vii) made to sit and stare at a wall for long periods of time. (A. 45-46). Consequently, G.A. and his mother sought his discharge from the facility. (A. 18).

On September 29, 1980, the medical staff at the facility responded to this request for release by initiating involuntary commitment proceedings against G.A. Florida law provides that a person may be confined to a mental institution "if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or

2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being."

Fla. Stat. § 394.467(1)(b) [1981]. Thus, the only issues material to an involuntary commitment proceeding are (a) whether the individual is of such a mental state that he would be dangerous to himself or others and (b) whether he is in need of supervised treatment. In accordance with Fla. Stat. § 394.467(2) [1981],[2] G.A. was temporarily confined against his will pending a hearing to determine whether he should be involuntarily committed. (A. 18).

Three days after the State had instituted proceedings, the Public Defender was appointed by the State to represent G.A. pursuant to Fla. Stat. § 27.51(1)(d), which provides in relevant part that "[T]he public defender shall represent any person who is determined by the court to be indigent . . . and who is . . . [s]ought by petition filed in such court to be involuntarily hospitalized. . . ." (A. 45).

Shortly following his appointment, the Public Defender was advised by the independent psychiatrist that it was likely that G.A. would be involuntarily committed at the upcoming proceeding unless his "treatment" program was terminated. (A. 45-46). The psychiatrist opined that "the conditions under which G.A. was confined were contributing to G.A.'s poor mental state" and that the ad-

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2. Fla. Stat. § 394.467 was substantially rewritten by the Florida Legislature in 1982. *See* Fla. Stat. § 394.467 (1982 Supp.). However, this revision did not become effective until October 1, 1982.

ministration of this treatment would "lead to his continued confinement under the Baker Act."[3] (A. 46).

B. The Decision To Bring The Class Action Suit

At this point the Public Defender was obligated to exercise his independent professional judgment as to how his office should represent G.A. Since the psychiatrist had informed the Public Defender that the psychological "treatment" to which G.A. was being subjected by the State could itself lead to development of a mental state necessitating involuntary commitment, the Public Defender could not limit his representation of G.A. to an appearance at a future involuntary commitment hearing. Such legal representation would be "too little, too late" because the issue at the hearing would be G.A.'s current mental state—not whether his "treatment" had reduced him to that state—and by the time the hearing occurred the "treatment" might well have caused irreparable damage to G.A.'s mental health. In addition, the Public Defender determined that confining G.A. under conditions posing a threat to his future liberty itself violated G.A.'s constitutional rights. (A. 51-52, 78).[4]

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3. Fla. Stat. §§ 394.451 through 394.4785 govern care and treatment of the mentally ill in Florida, including involuntary civil commitment. Pursuant to Fla. Stat. § 394.451, these provisions "shall be known as 'The Florida Mental Health Act' or 'The Baker Act.'"

4. In the judgment of the Public Defender, the conditions of G.A.'s confinement violated his rights under the First, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. (A. 20). The significant liberty interest of the individual in circumstances such as G.A.'s has recently been reaffirmed by this Court:

> This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.

(Continued on following page)

The Public Defender had also to take into account the severely limited resources available to his Office, the fundamental need to allocate his resources among various priorities, the fact that he had represented many other persons threatened with involuntary commitment in the past, and, finally, the existence of the statutory provision requiring his office to represent in the future all indigents facing involuntary commitment. (A. 47-50, 51-52). Moreover, it was the professional judgment of the Public Defender that he was more likely to obtain from the State the relief he sought for G.A. if he filed the suit as a class action claim. (A. 50, 52). Such a suit would force the State to review the entire treatment program of the facility, rather than simply to regard the case as relating to G.A.'s need for confinement. In short, the class action suit would force the State to take the case seriously and would timely place at issue the etiology of G.A.'s condition, thus opening the door for institutional reform.

Consequently, to ensure the protection of G.A.'s rights and in the exercise of his independent professional judgment, the Public Defender filed a class action suit in federal court pursuant to 42 U.S.C. § 1983 and Rule 23(b) of the Federal Rules of Civil Procedure on behalf of G.A. and all similarly situated persons (a copy of the Complaint in this federal civil rights action is reproduced at A. 158-174) to halt the use of "treatment" at the facility which would only increase the likelihood of involuntary commitment. (A. 51-52, 78). The Public Defender believed this tactical decision would increase both the likelihood of obtaining

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Footnote continued—

Addington v. Texas, 441 U.S. 418, 425 (1979). *See also Shuman v. State*, 358 So.2d 1333, 1335 (Fla. 1978) (recognizing that persons confined pursuant to involuntary commitment proceedings must be afforded same access to courts as persons confined pursuant to criminal charges).

relief for G.A. and the possibility of helping other similarly-situated past and future clients of the Public Defender. (A. 50, 52).

C. The Petition For A Writ Of Quo Warranto To Prohibit The Class Action Suit

The State of Florida, through the Respondent Attorney General, opposed the certification of the plaintiff class in the federal suit. Not content, however, to allow the certification question to be resolved by the federal court, the Attorney General took the unprecedented step of filing in the Florida Supreme Court an entirely independent action, a Petition for a Writ of *Quo Warranto* (the "*Quo Warranto* Petition") (A. 6-17), invoking that court's original jurisdiction and seeking to divest the Public Defender of his "authority to represent the plaintiffs in [the pending class action]".[5] The Attorney General argued that the Public Defender should be prohibited from bringing the class action because:

> The office of Public Defender . . . is a creature of Article V, § 18, Florida Constitution, with no authority outside of that provided by statute.

(A. 9). The Petition claimed that since Fla. Stat. § 27.51 does not specifically provide that the Public Defender is authorized to file any class actions, the Public Defender lacked such authority and was subject to an Order from the court halting such representation:

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5. Article V, Section 3(b)(8) of the Florida Constitution grants the Florida Supreme Court jurisdiction to issue writs of *quo warranto*. The *quo warranto* proceeding is employed where it is charged that an individual officer is performing duties that he does not have the authority to perform. *Quo Warranto* is an extraordinary remedy, to be granted or refused only "as the circumstances and the interests of the public require." 27 *Fla. Jur., Quo Warranto* § 11.

> The authority to proceed in a particular way only upon specific conditions implies a duty not to proceed in any manner other than that which is authorized by law.

(A. 10).

The Attorney General further argued that Petitioners were "exceeding their authority in several respects" (A. 11) by, among other things, filing any civil action and filing any federal action. (A. 11-13).

D. The Response To The Petition

The Public Defender initially offered three fundamental arguments in response to the Petition. First, he argued that Fla. Stat. § 27.51 in no way prohibits the filing of class action suits by public defenders. Uncontradicted affidavits from members of the Public Defender's Office stated that the Office had filed federal civil rights class actions in the past without objection from the State, listing by official style and case number some of those actions. (A. 23-24, 47-51). One of these cases reached this Court and was decided on the merits. *Gerstein v. Pugh*, 420 U.S. 103 (1975). In fact, the affidavits noted that the Public Defender had received and used federal grant money in the past for just this purpose. (A. 53-54). Neither the literal language of Fla. Stat. § 27.51, nor its fair implications, had ever been construed to bar the filing of appropriate class action suits in either state or federal court. (A. 24-32). Second, the Response asserted that constitutional, statutory, and ethical provisions require that the Public Defender be permitted to bring actions which in his judgment are necessary to effectively protect the rights of his clients. (A. 24). With respect to his ethical duties to his clients, the Response noted, the Public Defender is under the same obligations to his client as is a private attorney. (A. 35-37). Finally, the Response

argued that a prohibition against the Public Defender's use of appropriate class action suits would violate indigents' right of access to the courts under the United States Constitution. (A. 32-35).

Subsequent to the Response, this Court decided *Polk County v. Dodson*, 454 U.S. 312 (1981), and the Public Defender's Office timely filed supplemental papers explicating its second federal claim: State prohibition of class action suits brought by public defenders would violate Florida indigents' federal right to independent counsel by constituting direct State interference with the independent exercise of the Public Defender's professional judgment and would amount to state control of his tactical decisions. (A. 124-157).

Thus, the federal questions presented here were properly raised below (A. 32-35; A. 124-157), as is evident from the opinion of the Florida Supreme Court itself. (*See infra* at 12-13; A. 3-4).[6]

E. The Decision Of The Florida Supreme Court

On December 16, 1982, the Florida Supreme Court issued its opinion holding that a writ of *quo warranto* should be issued "divesting [the Public Defender] of the authority to represent [G.A. and those persons similarly

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6. The Public Defender here has standing to assert the Sixth and Fourteenth Amendment rights of G.A. and all other indigents. "Just as a litigant should always have standing to claim that he is being penalized for asserting his own constitutional rights, a litigant's claim that complying with a duty imposed upon him would prevent another from exercising a constitutional right presents a clearly justiciable issue about the permissibility of the choice government seeks to impose upon the litigant." L. Tribe, American Constitutional Law 104 (1978); *see Craig v. Boren*, 429 U.S. 190, 195 (1976) (beer vendor has standing to assert right of male beer buyers because compliance with legal duty would "result indirectly in the violation of third parties' rights"); *see also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distributor of contraceptives has standing to assert right of unmarried users).

situated] in a class action." (A. 3). Construing Fla. Stat. § 27.51 narrowly, the court specifically held that a public defender "cannot undertake representation of a class." (A. 3). Tactical considerations could not, according to the Florida court, make up for the Public Defender's lack of explicit statutory authority to initiate class action suits. (A. 3). Although the court noted the *Polk County v. Dodson* decision, it did not respond to that decision's characterization of the Public Defender as an independent practitioner free of state control. (A. 4). Following the denial of a petition for rehearing, proceedings have been timely initiated in this Court. (A. 1, 5).[7] This Petition for Writ of Certiorari requests review of the issuance of the Writ of *Quo Warranto* by the Florida Supreme Court which was sought and secured by the Attorney General of the State of Florida.

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7. Although G.A., the named plaintiff in the federal class action brought by the Public Defender, was eventually released from Jackson Memorial Hospital on a writ of *habeas corpus,* this case is not moot for two reasons:

First, the dispute between G.A. and Respondents is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). In fact, subsequent to G.A.'s release, a second involuntary commitment proceeding was brought against him by the State of Florida. (A. 73-77). Although G.A. escaped from Respondents' custody prior to this second commitment hearing (A. 22) (which the state dismissed), the State of Florida still remains free to bring another commitment proceeding against G.A.

Second, even if this case were moot with respect to G.A., it would not be moot as to the other members of the class for the reasons set forth in *Sosna v. Iowa,* 419 U.S. 393, 399-400 (1975) (holding that claims of unnamed members of the class continued to present a live controversy which outlasted the mootness of the named representative's claim); *Gerstein v. Pugh, supra* at 110 n.11. Although the class in *Sosna* had been certified by the district court, the fact that such certification is not present here does not moot the claims of unnamed class members, since their ability to litigate the issue of class representation through the Public Defender has been ended by the granting of the *Quo Warranto* Petition.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Florida Supreme Court To Prohibit Public Defenders From Filing Class Action Suits Conflicts With Decisions Of This Court Guaranteeing Indigents' Rights To Effective, Independent Counsel And Access To The Courts.

A. The Decisions Of This Court Explicitly Hold That The Right To Counsel Guaranteed By The Sixth And Fourteenth Amendments Requires Counsel To Be Independent Of State Control.

Less than two years ago, in *Polk County v. Dodson, supra* ("*Polk County*"), this Court reaffirmed "the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." 454 U.S. at 321-22. In an opinion joined by eight Justices, the Court observed that "implicit" in the right to counsel guaranteed by the Fourteenth Amendment "is the assumption that counsel will be free of state control." *Id.* Following principles established by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny, this Court flatly held that "[T]here can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.* As the Chief Justice wrote concurring, in establishing a public defender's office the state provides "a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial." *Id.* at 327.

In *Polk County*, this Court explicitly held that "a public defender is not amenable to administrative direction

in the same sense as other employees of the State." *Id.* at 321. A "defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior . . ." because he is "held to the same standards of competence and integrity as a private lawyer . . .", and these standards require that he "work under canons of professional responsibility that mandate his exercise of independent judgment on behalf of his client." *Id.* In so holding, this Court was following the mandate of Disciplinary Rule 5-107(B), ABA Code of Professional Responsibility (1976) and the explicit language of *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), which states: "the primary office performed by appointed counsel parallels the office of privately retained counsel. . . . Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

The right to counsel means the right to an attorney who is independent of tactical control by the State. Anything less would render this great guarantee meaningless.

B. The Decision Of The Florida Supreme Court To Prohibit Public Defenders From Filing Class Action Suits Inherently Conflicts With The Right Of Florida Indigents To Counsel Independent Of State Control.

In exercising his independent professional judgment, the Public Defender in the case at bar made the tactical decision that the appropriate tool to employ in representing his duly appointed client would be a federal class action suit to halt the "treatment" being administered to him and all similarly situated persons. The class action was chosen because it was the appropriate procedural vehicle for enjoining the "treatment" that was rapidly worsening

his client's condition and seriously endangering his client's ability to maintain the mental state necessary to avoid involuntary commitment; further, it provided the only means for efficiently allocating the limited resources of the Public Defender's office, resources which the Public Defender had to employ wisely if his future clients were going to receive the representation that was their constitutional due and if G.A. himself was to be assured adequate protection of his rights. Moreover, the Public Defender chose this tactical approach because he believed it was more likely to obtain from the State the relief his client required.

The decision of the Florida Supreme Court to prohibit public defenders from bringing any class action suits constitutes a clear violation of "the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Polk County*, at 321-22. The Florida Supreme Court reasoned that the public defender is strictly a "statutory creature" and may employ only such tactics as are authorized by statute. That Court did not contend that any statutory provision specifically prohibited the initiation of a class action suit by the Public Defender;[8] instead, it held that the "Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any additional persons. He therefore cannot undertake representation of a class." (A. 3). The court opined that "the mere fact that a decision is tactical is of no import. Invariably

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8. Chapter 27 of the Florida Statutes contains no such prohibition. The position of the State was based on the statutory provisions limiting the Public Defender's "duties" only to indigents he has been appointed to represent (A. 10, 15); Fla. Stat. § 27.51(1).

the respondents must still have the authority to act and here they simply do not." (A. 3).

This decision is especially disturbing when viewed in the context of the circumstances presented here. The named plaintiff was an indigent whom the Public Defender had been duly appointed to represent and whom the Public Defender was required to represent. The Public Defender was therefore appearing in the federal civil rights action to protect substantive rights guaranteed the class by the United States Constitution. Moreover, the Florida Supreme Court's prohibition was issued at the behest of the Attorney General, the highest legal officer of the Public Defender's traditional opponent, and was the result of a *Quo Warranto* Petition filed to prevent the Public Defender from continuing with a specific federal class action suit against the State. The Attorney General contended in his Petition, and the Florida Supreme Court agreed, that "the office of Public Defender . . . is a creature of Article V, § 18, Florida Constitution, with no authority outside of that provided by statute" and that "the authority of a Public Defender is defined and limited by statute . . . ." (A. 9). Since the relevant Florida Statutes do not specifically authorize the filing of any class action suits by the Public Defender, the Attorney General argued and the Florida Supreme Court held such suits may not be filed even where, in the independent professional judgment of the Public Defender, filing such a suit is proper or necessary. Thus, the *Quo Warranto* Petition was a direct attempt by the State to control, and restrict the tactical decisions of the Public Defender litigating against the State, and it has so far succeeded.

The decision of the Florida Supreme Court conflicts with the decisions of this Court construing the right to counsel secured for indigents under the Sixth and Four-

teenth Amendments because it does not respect and preserve from state control the independent professional judgment of the Public Defender. It does not permit him to represent indigents using the same procedural tactics that a private attorney would employ in representing his clients. It reduces him to a "statutory creature" and his representation to activity that must be explicitly authorized by statute. It constituted invasion and control of his tactical judgment by the Attorney General through the issuance of a Writ of *Quo Warranto* halting a specific class action against the state and absolutely prohibiting the filing of any future class action suits by Florida public defenders. This decision is contrary to this Court's holdings: the State may not control the otherwise legitimate litigation tactics of the Public Defender by absolutely withholding from the stock of tactical options available to him in serving his indigent clients those legitimate litigation tools a private attorney would use in representing his indigent or nonindigent clients.

C. The Decision Of The Florida Supreme Court To Prohibit Public Defenders' Class Action Suits Conflicts With Decisions Of This Court Which Guarantee Indigents The Right To Meaningful Access To The Courts.

The Public Defender's Office enjoys the benefit of only limited resources (which are themselves controlled by the State); consequently, the Florida Supreme Court's decision to deprive the Public Defender of the most efficient means of adjudicating the claims of large groups of indigents poses a serious threat that some indigents who qualify for representation by the Public Defender may not receive adequate legal assistance, or any representation at all. Thus, the decision would infringe their rights to

effective assistance of counsel and meaningful access to the courts. Under these circumstances, the decision of the Florida Supreme Court is in clear conflict with decisions of this Court.

The Florida Supreme Court decision conflicts with a line of this Court's decisions which ". . . have consistently required States to shoulder affirmative obligations to assure all prisoners *meaningful access to the courts.*" *Bounds v. Smith,* 430 U.S. 817, 824 (1977) (emphasis added). *Accord, Johnson v. Avery,* 393 U.S. 483 (1969); *Wolff v. McDonnell,* 418 U.S. 539, 577-80 (1974). In *Bounds v. Smith, supra* at 430 U.S. 828 & n.17, this Court held that the fundamental right of access to the courts required prison authorities in the State of North Carolina to provide inmates with law libraries or trained personnel necessary for the effective litigation of their federal civil rights actions. In *Wolff v. McDonnell, supra* at 577-80, this Court unanimously held that Nebraska prison authorities were constitutionally required to provide inmates with legal assistance for the preparation of federal civil rights actions, noting the importance of actions under 42 U.S.C. § 1983 to those confined pursuant to state authority.

Here, the Florida Supreme Court has gone much further in denying access to the courts than did either North Carolina or Nebraska. To allow the State to define by statute the persons the Public Defender must represent, to limit by appropriations the resources he has available to conduct this representation, to restrict by writ the legal tactics he may use in representing his clients, affords too much power to the State. It threatens to place an intolerable obstacle in the path of indigents seeking meaningful access to the courts through an effective, independent counsel. This threat has become reality in this case. Florida has allocated only limited resources to the Public

Defender, has required him to represent certain statutory classes of persons defined by statute (including indigents threatened with involuntary commitment), and now would prohibit his use of class actions which he needs to litigate effectively the claims of large classes of indigents.

The class action device is of special significance when federal civil rights are at stake. Since class representation makes it easier to bring claims on behalf of large numbers of indigents which would otherwise be too expensive to bring on an "individual" basis, the class action device insures the fulfillment of national policy as set forth in 42 U.S.C. § 1983 and similar statutes. Moreover, the presence before it of a class with similar claims forces the court to more carefully consider the scope and implications of its decision, and forces the institutional defendant to confront the institutional causes of those claims in a single setting. *See, Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1353 (1976). Indeed, the federal courts have recognized the special importance of class actions in civil rights cases and have accordingly made less strict the class certification standard for such claims, realizing that such suits under Rule 23(b)(2) are particularly tailored to permit "the assertion of claims by sizable groups seeking redress of social wrongs". Yeazell, *Interest, Class, and Representation*, 27 UCLA L.Rev. 1067, 1114-1115 (1980). Despite this clear federal policy in favor of civil rights class actions and the admitted obligation to respect the professional independence of the Public Defender, the Florida Supreme Court has prohibited him from maintaining such actions.

This decision is particularly disturbing where, as here, there can be no question federal rights are at stake. As noted in *Addington v. Texas*, 441 U.S. 418, 425 (1979),

"[t]his Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Accord, Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504, 509 (1972); *Specht v. Patterson,* 386 U.S. 605, 608 (1967). The decision of the Florida Supreme Court to deny indigents the class action remedy under these circumstances warrants the special attention of this Court.

II. Review Of This Case Is Of Fundamental Importance Because All Florida Public Defenders Are Now Prohibited From Filing Class Action Suits On Behalf Of Their Clients.

As the law in Florida now stands, no public defender may bring a class action suit on behalf of his indigent clients. Thus far, Florida is the only state to have construed *Polk County* to allow for this unprecedented interference with the independence of the public defender. The general rule among the states has been one of respect for the professional integrity of the public defender. Almost 40 years ago, in *Ex Parte Hough,* 24 Cal.2d 522, 150 P.2d 448 (1944) the California Supreme Court ruled that

> when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court.

24 Cal.2d at 529, 150 P.2d at 451-52. Courts in both Connecticut and Indiana have reasoned similarly. *See, e.g., Spring v. Constantino,* 168 Conn. 563, 362 A.2d 871 (1975); *State ex rel. Fulton v. Schannen,* 224 Ind. 55, 64 N.E.2d 798

(1946). Only Arizona has allowed the state to interfere in a limited way with the public defenders' representation of indigents, *see State v. Evans*, 129 Ariz. 153, 629 P.2d 989 (1981) (state public defender may not represent indigents seeking post-conviction relief in federal court pursuant to 28 U.S.C. § 2254 where federal court is authorized to appoint counsel), and then only where alternative legal representation was available pursuant to statute in a federal forum.

It is essential that this Court act now to reinstate the authority of Florida public defenders to represent their clients independent of state control and to prevent the adoption by other states of similar violations of the right to independent counsel.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served June 1, 1983, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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